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SAPURA HOLDINGS SDN BHD & ANOR

v.

NORTHERN TELECOM (ASIA) LTD & ORS

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HIGH COURT MALAYA, KUALA LUMPUR
HADHARIAH SYED ISMAIL JC
[SUIT NO: D1-22-436-1994]
13 SEPTEMBER 2009

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CONTRACT: *Oral agreement - Distributorship agreement - Based on oral representations - No initial written agreement - Distributorship agreement subsequently formalised - Whether there was a collateral contract based on oral undertakings of negotiating parties - Whether evidence of oral representations can be tendered - Whether contemporaneous documents*

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preferred to oral evidence - Evidence Act 1950, s. 92 - Whether written agreement overrides all previous agreements - Whether termination of distributorship lawful - Whether parties were joint-venture partners or 'buyer and seller' - Fiduciary duties of co-venturers - Damages and proof

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The defendants (Northern Telecom) are manufacturers of PABX systems. The plaintiffs (Sapura) were their distributors in Malaysia since 1979. In 1994, the defendants decided not to renew the distributorship agreement. Aggrieved, the plaintiffs brought an action for breach of contract, claiming, *inter alia*: (i) RM21,439,000 as

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special damages; (ii) a declaration that the termination of the distributorship was unlawful; and (iii) general and exemplary damages.

The facts showed that there was no written agreement for the distributorship from 1979 to 1984, and that the relationship started

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on a footing of trust (based on the oral undertakings between the defendants' chief executive ('Ben Beneteau') and the plaintiffs' executive chairman ('Shamsudin Kadir')) with a long-term partnership contemplated. A written agreement was introduced on 2 January 1984 and this was renewed on a yearly or bi-yearly basis

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until 31 December 1993. (The written agreement provided, *inter alia*, that: (a) the plaintiffs were granted a non-exclusive right to distribute the products; (b) the relationship between the parties was that of buyer and seller and that the plaintiffs were not distributors or agents; and (c) the written agreement superseded all prior

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agreements and understandings.)

The principal issues agreed to be tried were: (i) whether the relationship between the plaintiffs and the defendants was that of joint-venture partners or strictly as purchasers and vendors; (ii) whether there was a collateral contract between the parties or whether the written agreement constituted the entire terms of the business relationship and superseded any previous agreements or arrangements; (iii) whether the non-renewal of the agreement amounted to a termination of the same; and (iv) if it was a termination, whether it was lawful, fair and reasonable.

Held (allowing the action):

(1) In respect of the oral undertakings which the plaintiffs claimed were made by Ben Beneteau to Shamsudin Kadir in 1979, the court found that: (i) although Ben Beneteau was not called as a witness, evidence of the oral representations that he had made (as pleaded in the plaintiffs' statement of claim) was not hearsay; (ii) it is not in every case that s. 92 Evidence Act 1950 would exclude oral evidence or explanations in favour of contemporaneous documents. Depending on the surrounding circumstances, evidence of an oral agreement could be accepted; and (iii) Shamsudin Kadir was induced into the distributorship because of the oral representations made by Ben Beneteau. These oral undertakings formed a collateral contract that existed side by side with the distributorship agreement. (paras 27-33)

(2) It was clear from the facts that: (i) the business relationship and dealings between the parties were conducted without a strict adherence to the provisions of the written agreement. The relationship was cordial and akin to a partnership based on trust and confidence. The plaintiffs and defendants were therefore joint-venture partners, rather than mere purchasers and vendors; and (ii) as joint-venture partners, the parties' relationship was fiduciary, and the defendants owed a fiduciary duty to the plaintiffs to ensure the reasonable continuity of the plaintiffs' distributorship of the defendants' products. (paras 34-42)

(3) Considering the special relationship that existed between the parties since 1979, the abrupt and immediate termination of the distributorship agreement (without just cause) was unlawful. This had caused the plaintiffs to suffer losses in terms of the amounts they had invested in the joint-venture, the stock in

A hand, employees and creditors, and the expenses incurred to keep the venture going without a core business. (paras 43, 53-54)

[Special damages and declaration sought granted.]

B **Case(s) referred to:**
Bonham Carter v. Hyde Park Hotel Ltd 64, TLR 177 ***(refd)***
Foo Sam Ming v. Archi Environ Partnership [2004] 1 CLJ 759 CA ***(refd)***
Grace Shipping Inc & Anor v. CF Sharp & Co (Malaysia) Pte Ltd [1987] 1 MLJ 257 ***(refd)***
C *James Birtchnell & Anor v. The Equity Trustees, Executors and Agency Co Ltd & Anor [1928-30] 42 CLR 384* ***(refd)***
Jenyns v. Public Curator (Q) [1953-54] 90 CLR 113 ***(refd)***
Mallet v. Mc Mongale [1970] AC 166 ***(refd)***
Newacres Sdn Bhd v. Sri Alam Sdn Bhd [1991] 3 CLJ 2781; [1991] 1 CLJ (Rep) 321 SC ***(refd)***
D *New Zealand Netherlands Society Oranje Incorporated v. Kuys & Anor [1973] 2 All ER 1222* ***(refd)***
Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635 HC ***(refd)***
Tan Swee Hoe Co Ltd v. Ali Hussain Bros [1980] 2 MLJ 16 ***(refd)***
E *Tindok Besar Estates Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC* ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 92

Other source(s) referred to:
F *Williston on Contract,* 3rd edn, 1959, vol 2, pp 555-556

For the plaintiffs - Shahul Hameed Amiruddin (Norliza Rasool Khan with him); M/s Zul Rafique & Partners
For the defendants - K Shanti Mogan (Sheila Linggam with him); M/s Shearn Delamore & Co

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Reported by Gan Peng Chiang

JUDGMENT

H **Hadhariah Syed Ismail JC:**

[1] The 1st plaintiff's group of companies, including the 2nd plaintiff, specialize in the manufacturing, marketing, distributing, exporting, installing and servicing of telecommunications equipment. The 3rd defendant is the manufacturer of Private Automatic
I Branch Exchange, commonly known as PABX System. The 1st defendant was incorporated by the 3rd defendant to market the products of the 2nd defendant in Asia. The 2nd defendant is the

international trading arm of the 3rd defendant. From 1979 to 1994, the plaintiffs were the Malaysian distributor of PABX System, manufactured by the 3rd defendant. On 20 April 1994, the defendant sent a letter to the plaintiff notifying of its decision not to renew the distributorship agreement for 1994. The plaintiffs allege that the act of the defendant in not renewing the agreement tantamount to a breach of contract and unlawful. As a result of the termination, the plaintiffs have suffered losses and damages. *Vide* this suit, the plaintiffs pray for the following:

(a) Special damages in the sum of RM21,439,000;

(b) General damages;

(c) Punitive and exemplary damages;

(d) A declaration that the defendants wrongfully, unlawfully, unjustly and unconscionably failed to renew the plaintiffs' contract with the defendants;

(e) Interest at such rate and from such date as this court may deem just and expedient;

(f) Other relief this court may deem just and expedient.

Relationship Between The Parties

[2] The Executive Chairman in Sapura, Tan Sri Dato' Sri Ir Shamsudin bin Abdul Kadir (PW1) gave evidence on how the relationship between the parties begin. His evidence can be summarized as follows. Prior to 1979, Northern Telecom (NT) products, particularly known as the PABX System, were distributed in Malaysia solely by Electroscon Sdn Bhd, a company owned by Dato' Hj Mokhtar bin Mohidin, a colleague of PW1. In 1979, a person by the name of Ben Beneteau, Chief Executive of the 2nd and 3rd defendant, approached PW1 and requested him to take over distributorship of NT products from Electroscon Sdn Bhd. In para. 5.3.1 to 5.3.9 of the statement of claim, it was pleaded that in the said negotiations, Ben Beneteau had made the following representations:

5.3.1. The 3rd defendant's choice of the 1st plaintiff was based on the 1st plaintiff's past and continuing performance in the telecommunication field in Malaysia, and on the in-house resources that were readily available to the 1st plaintiff;

A 5.3.2. The initial marketing of the PABX System and the matters attendant thereto including a commitment to service and maintain the System would be slow and in the process, the 1st plaintiff would suffer losses;

B 5.3.3. That Malaysia offered tremendous growth potential for the PABX System. The market would eventually prove to be highly profitable and the losses absorbed by the 1st plaintiff in the initial years could be reversed and the 1st plaintiff would be able to reap sizeable and substantial benefits;

C 5.3.4. All the defendants would make available to the plaintiffs all the assistance and back-up required in the plaintiffs' endeavour to market the PABX System;

5.3.5. All the defendants would also make available an agency to
D the plaintiffs in respect of the PABX System and the various other NT products;

5.3.6. The 1st plaintiff and the 3rd defendant should enter into a long term commercial relationship in the telecommunications field
E which would be commercially beneficial to both parties;

5.3.7. That the services of the plaintiffs would be required to market the PABX System on a long term basis with provisions for automatic renewals;

F 5.3.8. That to instill confidence amongst the purchasers and to establish a reputation for the PABX System, the plaintiffs should hold spare parts for at least a period of five years of supply;

5.3.9. The plaintiffs' past record and reputation will also instill
G confidence amongst the prospective purchasers that the PABX System supplied was a quality product and that the same would be serviced and maintained effectively.

[3] At first, PW1 was reluctant to take over the distributorship.
H He states the reasons why he was not keen as:

(i) Electroscon was owned by his friend and he did want any animosity or unhealthy competition.

(ii) Taking distributorship of a product like the PABX System
I requires a long term commitment.

(iii) The capital investments are quite high.

(iv) The returns are uncertain and unpredictable.

[4] But Ben Beneteau insisted. To make PW1 accept the distributorship, Ben Beneteau pledged that the entire in-house resources NT has as manufacturer of the product would be readily made available to the plaintiff. He was specifically informed by Ben Beneteau that NT was not interested in a one-off transaction but was looking for a long term relationship with Sapura to take on the market in partnership. PW1 was persuaded. Plaintiffs were officially appointed as the sole distributor for NT products in Malaysia. It is clear then that the deciding factor which led PW1 agreeing to enter into the relationship with NT is his conversation with Ben Beneteau and his belief in what Ben Beneteau had said. He did not confirm the oral agreement with Ben Beneteau in writing because in his own words "We in the top echelon of the business rely on oral undertakings and we do not question the sincerity of the other side."

[5] It is a fact that there was no written agreement for the distributorship from 1979 to 1984. To PW1, the relationship between the parties is not as purchaser and vendor. He categorically said that he would not have agreed to be a distributor of the PABX System if there would be an agreement in writing which is valid for one year because the life span of the products is more than a year and it would have been suicidal for the plaintiff to have gone into a venture of this nature.

Relationship From 1979-1984

[6] PW1 described the relationship between the parties as a true partnership. Defendants had products to offer. Plaintiffs had the personnel to find the market for the products and the defendants helped the plaintiffs whenever there were manufacturer's defects or plaintiffs required assistance.

The Agreements

[7] In 1984, Uniphone Sdn Bhd, a wholly owned subsidiary of the 1st plaintiff was distributing NT products. After five years of relationship, a written agreement was introduced. Plaintiffs was told not to worry because the 2nd defendant only need to standardize their affairs with various distributors but the relationship with the plaintiff would continue unchanged. For ease of reference, the agreements entered into between the parties are listed in the table below.

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Written Agreements

Date	Page	Document	Parties	Period
31.12.81	1 - 30	License Agreement	Northern Telecom Ltd and Uniphone Sdn Bhd	5/10 years
31.12.81	31 - 43	Supply Agreement	Northern Telecom Ltd and Uniphone Sdn Bhd	10 years
01.09.82	44 - 48	Amending Agreement	Northern Telecom Ltd and Uniphone Sdn Bhd	N/A
02.01.84	49 - 60	Distributorship Agreement	Northern Telecom (Asia) Ltd and Uniphone Sdn Bhd	02.01.84 - 03.01.85
02.01.85	61 - 89	Distributorship Agreement	Northern Telecom (Asia) Ltd and Sapura Holdings Sdn Bhd	02.01.85 - 03.01.87
19.07.85	90 - 96	Repair Agreement (Distributor)	Northern Telecom International Ltd and Sapura Holdings Sdn Bhd	19.07.85 - termination of DA 1985
04.01.87	97 - 106	Distributorship Agreement	Northern Telecom (Asia) Ltd and Sapura Holdings Sdn Bhd	04.01.87 - 31.12.89
04.01.87	107-114	Software License Agreement	Northern Telecom (Asia) Ltd and Sapura Holdings Sdn Bhd	04.01.87 - termination of DA 1987
01.11.90	115-117	Renewal & Amending Agreement	Northern Telecom (Asia) Ltd and Sapura Holdings Sdn Bhd	DA 1984 renewed from 01.01.91 - 31.12.92
31.12.92	474	Letter from D1 to P2	Note: unsigned	DA renewed from 01.01.93 - 31.12.93

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[8] As can be seen, the first distributorship agreement is dated 2 January 1984. The relevant clauses in the agreement referred to by counsel for the defendants to PW1 are cls. 2, 3, 17 and 19. These clauses state as follows:

> 2. Northern Telecom hereby grants to Distributor, who accepts, the non-exclusive right to distribute and sell the Products in the territory to customers other than those excluded by Appendix "A".
>
> 3. This Agreement shall commence on execution and expire on 3rd January, 1985 unless sooner terminated, subject, however, to extension as may be agreed in writing by both parties not later than sixty (60) days prior to the expiry of the term.
>
> 17. This Agreement shall neither constitute Distributor an agent, nor authorize it to deal in the name of Northern Telecom, nor create any relationship between the parties other than that of seller and buyer.
>
> 19. This Agreement with Appendices constitutes the entire Agreement between the parties with respect to the subject matter hereof. All prior agreements and understandings related thereto are hereby cancelled. This agreement may not be amended except by a written document signed by both parties.

[9] It is pertinent to note that subsequent distributorship agreements between the parties also contained similar clauses. On being shown the above clauses, PW1 agreed that his oral testimony is inconsistent with the content of the clauses. He also agree that the parties' relationship with regard to products, repair, software products and every facet of their relationship were regulated in writing. Despite all that, PW1 maintains his answer that he held to the oral agreement he made with Mr Ben.

[10] The 1984 Agreement was renewed by another written agreement dated 2 January 1985 (the 1985 Agreement) and entered into between the 2nd defendant and the 1st plaintiff. The terms and conditions of the 1985 Agreement was, in substance, the same as the 1984 Agreement.

[11] Upon the expiry of the 1985 Agreement, by effluxion of time, the same was renewed by an agreement in writing dated 4 January 1987 and entered into between the 1st defendant and the 1st plaintiff (the 1987 Agreement).

[12] Unlike the 1984 or the 1985 Agreements, the 1987 Agreement was not renewed but both the plaintiffs and the defendants conducted their affairs and their business transactions in accordance with the said representations and past conduct.

[13] By an agreement entitled "Renewal And Amending Agreement" dated 1 November 1990 and entered into between the 1st defendant and the 1st plaintiff (the 1990 Agreement), the 1987 Agreement was purportedly renewed. But the 1990 Agreement was only forwarded to the 1st plaintiff by the 1st defendant by a letter dated 24 February 1992 and never executed.

[14] By a letter dated 31 December 1992, the 1st defendant renewed the 1990 Agreement which was expiring by effluxion of time on 31 December 1992, for a period of one year from 1 January 1993 to 31 December 1993.

[15] By a letter dated 17 February 1994, the 1st defendant informed the 2nd plaintiff that the plaintiff's renewal agreements were currently being processed by their Corporate Legal Department.

How Business Was Conducted

[16] It is an undisputed fact that the plaintiffs need to maintain stocks and sufficient spare parts for at least five (5) years supply to render effective service to the end user. This is also the plaintiffs' commitment to Jabatan Telekom Malaysia to support potential customers for five years. The manner in which both parties conducted their business is described by PW3 as follows. The relationship is far more than as a distributor. He gives an example by referring to Licence Agreement dated 31 December 1981, Supply Agreement dated 31 December 1981 and Amending Agreement dated 1 September 1982 between 2nd defendant and 3rd defendant and Uniphone Sdn Bhd, whereby the 3rd defendant granted Uniphone Sdn Bhd a licence and patent rights to manufacture and market some of their main Distributing Frame Equipment in Malaysia, India, Bangladesh, Pakistan, Bhutan, Burma, Cambodia, Laos, Nepal, Sri Lanka, Vietnam and Afghanistan. In the words of PW2, this scenario indicates there was a lot of trust between the plaintiffs and the defendants to the extent the defendants shared their intellectual property with the plaintiffs. Another example given by PW2 is the defendants' willingness to train the plaintiff's personnel in the repair of advanced new equipment without having

any pre-condition as to the confidentiality or trade secrecy. Having perused the notes of proceedings, it is obvious that the parties happily conducted their business without strict adherence to the terms of the agreement.

Further Inducement

[17] Evidence was led by PW2 that sometime in or about September 1992, there was a series of meetings between the officers of the plaintiffs and the defendants. In the course of the meetings, one Row Zadher, the then General Manager of ASEAN and Australasia, an officer of the 1st defendant represented, in the presence of PW2, to Shahril Shamsuddin, the Group Managing Director of the 1st plaintiff, that:

(a) The time has matured for the upturn in the market for the PABX System;

(b) To enhance the image of the PABX System and to reap benefits, the 2nd plaintiff should change its name from Premier Communications and Engineering Sdn Bhd to include the name "Sapura" to enable the 2nd plaintiff to be readily identified with the Sapura Group of Companies.

(c) To further enhance the image of the 2nd plaintiff as an entity of its own and a successful company of the Sapura Group, the 1st plaintiff should do the following to project a sales and service image more compatible with the defendant's product line:

(i) The 2nd plaintiff should move and upgrade its premises;

(ii) A new repair centre should be constructed with the requisite equipment; and

(iii) Enhance and improve the service division and to prepare it to render fast, effective and quality service.

[18] Acting on trust and good faith in the truth of the representations made by the defendants, the 1st plaintiff implemented the following:

(a) The change of its name from the former name of Premier Communications & Engineering Sdn Bhd to Sapura Teletech Solutions Sdn Bhd;

(b) Recruited and enlisted 25 qualified new staff to increase the support staff from 67 to 92 employees thereby incurring additional annual wages of RM793,486.83;

(c) Constructed a new repair centre at a cost of RM111,029 totally dedicated to the defendants' products;

(d) Sent selected staff to learn advanced servicing techniques at a cost of RM293,243;

(e) Incurred expenditures for advertising and promotional exercises in the sum of RM279,501;

(f) Caused the 2nd plaintiff to move and upgrade its premises thereby incurring renovation and moving expenses amounting to RM 279,809.50;

(g) Opened new service centres in Batu Pahat, Petaling Jaya, Ipoh, Penang, Miri and Kuala Lumpur.

The Breach

[19] The incident which led to the termination of the plaintiff's distributorship agreement is this. In or about 1992, the plaintiffs identified Hyatt Hotel in Johor Bahru as a potential customer for the PABX System and the same was communicated to the defendants so that a joint strategy could be worked out. However, to the plaintiffs' surprise, the 1st defendant authorised and assisted one Folec Communications (Singapore) Pte Ltd (Folec Singapore) to submit a proposal for this project using the same equipment as the 2nd plaintiff had proposed to use.

[20] It is PW2's further evidence that the defendant had appointed Folec Malaysia sometime in December 1993 to take over the local market for the PABX System. The appointment of Folec Malaysia was not indicated to the plaintiffs prior to the non-renewal of the Distributorship Agreement with the plaintiffs. Neither did the plaintiffs receive any notice or indication that the Distributorship Agreement would not be renewed.

[21] In fact when PW2 attended a meeting between the plaintiffs and the defendants on 26 August 1993, he specifically asked the defendants why the Distributorship Agreement for 1993 was yet to be signed, he was assured not only that the 1993 Agreement would

be signed but the Agreement for 1994 would also be renewed. The 2nd plaintiff had even written to the defendants by their letter dated 3 February 1994 asking the defendants to honour their promise. Such request was ignored and rejected by the defendants.

Termination

[22] In a meeting held on 19 April 1994 amongst the officers of the plaintiffs and the defendants, one Craig London (DW3), the Managing Director of the 2nd defendant, indicated that the plaintiffs' agreement with the defendants will not be renewed. The plaintiffs were notified in writing of the termination by a fax transmission dated 20 April 1994.

[23] The plaintiffs contend that the non-renewal tantamounts to termination and is unreasonable, unfair, unlawful and wrongful and in breach of the collateral and other agreements. In the alternative, the plaintiffs contend that such termination is in breach of the fiduciary and other duties the defendants owe to the plaintiffs as co-venturer.

[24] In the alternative, the plaintiffs contend that the defendants are stopped both in law and in fact from terminating the agreement.

Losses And Damages Suffered

[25] By reason of the matters above mentioned, the plaintiffs have suffered and continue to suffer losses and damages.

Particulars of Special Damages

(a) Actual amount invested	–	RM9,680,000
(b) Loss of future profits	–	to be assessed
(c) Termination benefits payable to 92 staff	–	RM554,583.02
(d) Stock in hand of NT Products and PABX spares	–	RM5,004,000
(e) Loss of gross profits on pending tenders plus maintenance contracts for 1994	–	RM6,200,000

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Issues To Be Tried

[26] Both parties have formulated the issues to be determined by this court as follows:

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1. Whether by reason of conduct and the mode and manner in which the parties hereto dealt with each other, the parties treated the plaintiffs as one and the same entity, and the defendants as one and the same entity.

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2. Whether the relationship between the 1st plaintiff and the 3rd defendant was:

   (a) That of co-venturers (in the enterprise of marketing, distributing and servicing the said NT Products (as defined in the pleadings)) or

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   (b) That of vendor and purchaser where the purchaser also acted as distributor (in the enterprise of marketing, distributing and servicing the said NT Products (as defined in the pleadings)).

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3. Whether there was a collateral agreement in place between the parties or whether the terms of the agreement were contained entirely within written agreements which superseded all prior agreements. If there was a collateral agreement, what were the terms of the same.

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4. Whether the non-renewal of the said agreement was tantamount to a termination of the same. If so, whether that termination was lawful, fair and reasonable.

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5. If the termination was unlawful, unfair and unreasonable, what is the measure of damages payable to the plaintiffs as per the pleadings.

[27] Despite the numerous issues listed, I was of the opinion that the primary issue to be determined is whether the termination was

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unlawful, unfair and unreasonable.

The Court's Approach

[28] In this case the court was asked to determine essentially what

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is the true relationship between the plaintiffs and the defendants. Is their relationship as buyer-seller or distributor or joint venturer? The

plaintiffs' pleaded case is they are co-venturers. My task would be to interpret the facts and determine the true nature of the bargain in substance. To do that, I will deal first with the issue of oral representations made by Mr Ben Beneteau.

[29] Counsel for the defendants submit that since Mr Ben was not called as a witness, evidence relating to oral representations as pleaded in para 5.3.1 to 5.3.9 of the statement of claim are hearsay evidence and ought to be rejected. I disagree with counsel's submission. The evidence on oral representations tendered by PW1 did not constitute hearsay evidence because that was the negotiations between PW1 himself and Mr Ben. It was a direct communication between the two of them. This is not a case of PW1 obtaining the information from a third party. The only suggestion put forward to PW1 is Mr Ben had no authority to make such representations. But PW1 maintains his answer that he held on to the oral agreement made by Mr Ben. What is important to note is the business relationship between the parties is founded on trust. That is why PW1 did not ask Mr Ben to put the oral contract into writing. Considering the huge commitment and risk undertaken by PW1 in agreeing to be the distributor of the defendants' products and the straightforward answers given by PW1, I had no hesitation in saying that PW1 was telling the truth.

[30] Another point raised by counsel for the defendants with regard to oral representations is this. Under s. 92 of the Evidence Act 1950, plaintiffs cannot adduce oral evidence to contradict the distributorship agreement. To support her contention, counsel refers this court to the following cases:

1. *Foo Sam Ming v. Archi Environ Partnership* [2004] 1 CLJ 759.
2. *Tindok Besar Estates Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119.
3. *Grace Shipping Inc & Anor v. CF Sharp & Co (Malaysia) Pte Ltd* [1987] 1 MLJ 257.

[31] In all these cases the courts preferred contemporaneous documents than oral explanations by witness because memories may well be unreliable. Especially in this case where the oral evidence of PW1 was made almost 30 years after the representations. But the writ of summons and the statement of claim of this case were filed in May 1994. I do not think it is the law that in every case where there is a contemporaneous documents, oral evidence

will not be preferred. It is only fair that the surrounding circumstances of the case must be taken into account as well. There is case law which recognises that oral agreements can be accepted as a collateral contract side by side with the main agreement. In *Tan Swee Hoe Co Ltd v. Ali Hussain Bros* [1979] 1 LNS 113, Raja Azlan Shah (as His Royal Highness then was) in delivering the judgment of the court states:

> In our view those cases are strong authority for the proposition that an oral promise, given at the time of contracting which induces a party to enter into the contract overrides any inconsistent written agreement. This device of collateral contract does not offend the extrinsic evidence rule because the oral promise is not imported into the main agreement. Instead it constitutes a separate contract which exists side by side with the main agreement.

[32] Applying the above authority to the facts of this case, it is obvious that PW1 was induced into agreeing to be a distributor of the defendants' products and ventured into the business of marketing and distributing telecommunications equipment as a result of the oral representations made by Mr Ben as pleaded in para. 5.3.1 to 5.3.9 of the statement of claim. PW1 not only believed in what Mr Ben had promised him but he held on to that promise. In the circumstances, this court holds that the oral representations formed a collateral contract, side by side with the Distributorship Agreement.

[33] The next issue is what is the true relationship between the parties? The plaintiffs' witnesses, in particular PW2, have mentioned that the relationship between the parties are beyond the agreement. To this witness, there was a joint venture. However one thing is certain and that is the word "joint venture" does not appear in any of the agreements. But that does not preclude this court from determining whether there was a joint venture or not. It is open to this court to make an objective assessment of the proved and admitted facts to conclude the true relationship between the parties. I will start off with the definition of the word "joint venture". What is joint venture? A joint venture is defined by *Williston on Contract* (3rd edn 1959) vol. 2 at pp 555-556 as follows:

> In summary, then, a working definition of Joint Venture based on the actual judicial decisions may be thus formulated: A joint venture is an association of persons, natural or corporate, who agree by contract to engage in some common, usually *ad hoc* undertaking for joint profit by combining their respective resources,

without however, forming a partnership in the legal sense (of creating that status) or corporation; their agreement also provides for a community of interest among the joint venturers each of whom is both principal and agent as to the others within the scope of the venture over which each venturer exercises some degree of control.

[34] Next, what are the proved and admitted facts which support the existence of joint venture? One example would be the event that took place in September 1992, wherein at the request of the defendants, the plaintiffs implemented the following:

1. Change the 2nd plaintiff's name.
2. Recruit 25 new staff.
3. Construct a new repair centre.
4. Implement numerous advertising and promotional exercises.
5. 2nd plaintiff moved places and upgraded its premises.
6. Opened new service centres in Batu Pahat, Petaling Jaya, Ipoh, Penang, Miri and Kuala Lumpur.

[35] In addition, there was the unchallenged evidence of PW3 that the 3rd defendant had granted Uniphone Sdn Bhd a license and patent right to manufacture and market some of their Main Distributing Frame Equipment in Malaysia, India, Bangladesh, Pakistan, Bhutan, Burma, Cambodia, Laos, Nepal, Sri Lanka, Vietnam and Afghanistan.

[36] Another instance would be plaintiffs and defendants jointly prepared business plans before the beginning of each new year, every year from 1991. There are also instances where despite repair agreements not being signed, the plaintiffs undertook repair of the defendants' PABX equipment and repair centres were put up.

[37] Having carefully analysed the facts of this case, I found that the parties conducted their business without adhering strictly to the provisions of the written agreement. The relationship is cordial like a partnership. They help each other. The parties' actions are actuated by trust and confidence. The plaintiffs would not have implemented item 1-6 above if they had no confidence and trust in the defendants. This kind of relationship is more than buyer and

seller or distributor. To me it is consistent with a joint venture as defined by *Williston* with the plaintiffs as co-venturer. Here the plaintiffs control the venture, find new markets and maximize the sales. Whereas the defendants control the products. With that I conclude that notwithstanding the word "joint venture" is not mentioned anywhere in the agreement, the conduct of the parties and the surrounding circumstances of the case irresistibly point that there was a joint venture as defined by *Williston*.

[38] The next question to be decided is what is the legal consequences of a joint venture. In *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [1991] 3 CLJ 2781; [1991] 1 CLJ (Rep) 321, Jemuri Serjan (CJ Borneo) states as follows:

> With respect to the question of fiduciary relationship between the parties, learned counsel for the respondent referred us to the definitions of "Trust" and "Trustee" in the Specific Relief Act 1950 (Act 137) where fiduciary ownership and fiduciary character are included. It is the respondent's case that a fiduciary relationship is established between the appellant and the respondent when they entered into the joint venture agreement. He supported his proposition by citing Australian Supreme Court case of *Brian Pty Ltd v. United Dominions Corp Ltd* [1983] 1 NSWLR 490. Samuels JA at p 506 says that after reviewing the authorities, he is of the opinion that joint venturers owe to one another the duty of utmost good faith due from every member of a partnership towards every other member. In the same case Hutley JA at p 496 has this to say on this subject:
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> > Though joint venture agreements are common, particularly in the resource development field, there is little authority as to the responsibilities of the joint venturers, *inter se*. In *Canny Gabriel Castle Jackson Advertising Pty Ltd v. Volume Sales (Finance) Pty Ltd* [1974] 131 CLR 321, what was described as a joint venture was held to be a partnership. That joint ventures have fiduciary relationships, *inter se* would seem to be essential for the efficacy of the device.

[39] In the High Court of Australia case of *Jenyns v. Public Curator (Q)* [1953-54] 90 CLR 113, Dixon CJ, Mc Tiernan and Kitto JJ have this to say at p 133:

> We are not here dealing with any of the traditional relations of influence or confidence-solicitor and client, physician and patient, priest and penitent, guardian and ward, trustee and *cestui que* trust. It is a special relationship set up by the actual reposing of

> confidence. It is therefore necessary to see the extent and nature of the confidence reposed and whether it involved any ascendancy over the will of the person supposedly dependent on the confidence.

[40] The judges here were talking about fiduciary relations between the parties. In the case of *James Birtchnell & Anor v. The Equity Trustees, Executors and Agency Co Ltd & Anor* [1928-30] 42 CLR 384 Dixon J at p. 407 explains the fiduciary relationship between partners and how the relationship is to be determined.

This is what he says:

> The relationship between partners is, of course, fiduciary. Indeed, it has been said that a stronger case of fiduciary relationship cannot be conceived than that which exists between partners. "Their mutual confidence is the lifeblood of the concern. It is because they trust one another that they are partners in the first instance; it is because they continue to trust one another that the business goes on" (per Bacon VC in *Helmore v. Smith* [1890] 15 App Cas 223 at p. 225; [1886] 35 Ch D 436 at p. 444). The relation is based, in some degree, upon a mutual confidence that the partners will engage in some particular kind of activity or transaction for the joint advantage only. In some degree it arises from the very fact that they are associated for such a common end and are agents for one another in its accomplishment. Lord Blackburn found in this consideration alone sufficient reason for the fiduciary character of the partnership relation (*Cassels v. Stewart* [1881] 6 App Cas at p. 79). The subject matter over which the fiduciary obligations extend is determined by the character of the venture of undertaking for which the partnership exists, and this is to be ascertained, not merely from the express agreement of the parties, whether embodied in written instrument or not, but also from the course of dealing actually pursued by the firm. Once the subject matter of the mutual confidence is so determined, it ought not be difficult to apply the clear and inflexible doctrines which determine the accountability of fiduciaries for gains obtained in dealing with third parties.

[41] That passage was approved by Lord Wilberforce in the case of *New Zealand Netherlands Society Oranje Incorporated v. Kuys & Anor* [1973] 2 All ER 1222 at p 1226, Lord Wilberforce says, after quoting the relevant passage of Dixon J's judgment:

> This was said in the context of a partnership but the principle must be of general application.

[42] In this case, it is the plaintiffs' pleaded case that the defendants as co-venturer owed a fiduciary duty to the plaintiffs. Applying the above principles discussed in *Newacres* case, I hold that the defendants as a joint venturer stood in a fiduciary position to the plaintiffs in relation to the continuity of the plaintiffs as the distributor of the defendants' products. Any transaction engaged by the defendants must be in good faith for the joint benefit of the venture only. If the defendants did not terminate the agreement abruptly and did not appoint Folec, the plaintiffs would not have suffered losses.

Termination

[43] In order to determine whether the termination is unlawful, this court took into consideration the the chronology of events that had taken place between the parties as follows:

1. In or about 1992, the plaintiffs identified Hyatt Hotel in Johor Bahru as a potential customer for the PABX System and the same was communicated to the defendants so that a joint strategy could be worked out. But the 1st defendant authorized and assisted Folec Communications (Singapore) Pte Ltd (Folec Singapore) to bid for the same project using the same equipment.

2. Whilst the relationship existed between the plaintiffs and the defendants, DW3 had unilaterally appointed Folec Communication (M) Sdn Bhd as a parallel distributor in Malaysia for the NT products.

3. Plaintiffs were led to believe that a new contract for 1994 will be made. But it turned out that such promise was made with no intention to honour.

4. The sales target set by the defendants for the plaintiffs for 1994 was USD2.5 million and the plaintiffs achieved this target.

5. Only in a meeting held on 19 April 1994 between both parties, the plaintiff was informed that the agreement will not be renewed. The decision was notified in writing on 20 April 1994.

[44] In view of the special relationship that existed between the parties since 1979, the defendant's conduct of terminating the agreement abruptly and immediately without just cause was indeed unlawful and unjust to the plaintiff.

Plaintiffs To Prove Their Loss

[45] It is settled law that a party who claims for damages must prove its claim. Lord Goddard in *Bonham Carter v. Hyde Park Hotel Ltd* 64, TLR 177, 178 states the principle as follows:

> Plaintiffs must understand that if they bring action for damages, it is for them to prove their damages; it is not enough to write down the particulars, so to speak, throw them at the head of the Court saying: This is what I have lost, I ask you to give me these damages. They have to prove it.

[46] In *Popular Industries Ltd v. The Eastern Garment Manufacturing Co Sdn Bhd* [1990] 1 CLJ 133; [1990] 2 CLJ (Rep) 635, the High Court states:

> It is axiomatic that a Plaintiff seeking substantial damages has the burden of proving both the fact and the amount of damages before he can recover. If he proves neither, the action will fail or he may be awarded only nominal damages upon proof of the contravention of a right. Thus nominal damages may be awarded in all cases of breach of contract (see *Marzetti v. William*). And, where damage is shown but its amount is not proved sufficient tly or at all, the Court will usually decree nominal damages. See for example *Dixon v. Deveridge* and *Twyman v. Knowles*.

[47] In *Mallet v. Mc Mongale* [1970] AC 166 at p 176, Lord Diplock enunciated the following principles of law:

> The role of the Court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a Court must decide on the balance of probabilities. Anything that is more probable than not it treats as certain. But in assessing damages which depends upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the Court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even in the amount of damages which it awards.

[48] With those principles in mind, I will assess the damages claimed by the plaintiffs. Under para. 13 of their statement of claim, the amount of special damages claimed by the plaintiffs is RM21,439,000. To prove this amount, the plaintiffs relied on the evidence of PW4 and PW5. Both witnesses gave evidence on the

amount invested and the losses suffered by the plaintiffs. Their evidence is based on the accounts audited by Hanafiah Raslan & Mohamad which was acquired by Arthur Andersen. To begin with, PW4, a qualified accountant, told the court that after the Distribution Agreement was terminated on 20 April 1994, the plaintiffs were without a core business but with employees, stock in trade, trade creditors and debtors. He further testify that when the distributorship agreement was stopped, the plaintiffs' business came to a stop with the exception of existing maintenance agreement between the 2nd plaintiff and its customers which include service and repair contracts. He further testified that the financial year only ended on 31 January 1995. Post termination, the 2nd plaintiff did not carry on any new businesses and the figures appearing in the audited accounts for the year ending 1995 prove all its losses. Based on the audited account for the year ending 1995, PW4 said the total losses suffered by the plaintiffs as a result of the termination is RM12,787,000. According to him, this amount includes the stock in trade at a cost of RM3,351,000, expenses incurred in recruiting additional new employees, constructing a new repair centre for the defendants' products, training for staffs, advertising and other promotional expenses, renting and renovating a new premises and for renting premises as service centres in Batu Pahat, Petaling Jaya, Ipoh, Penang, Miri and Kuala Lumpur. Counsel for the defendants sought to challenge the accuracy of PW4's statement on RM12,787,000 to which PW4 agrees that the source documents and the breakdown figures for the said amount is not before the court. But PW4 categorically disagreed that RM12,787,000 did not reflect plaintiffs' losses as a result of the termination.

[49] Counsel for the defendants also sought to show that the plaintiffs did not suffer any losses because for eight years from 1979, 1983, 1985, 1986, 1987,1990 and 1991, the 2nd plaintiff suffered a loss and the profits for years 1980, 1981, 1982, 1989, 1992 and 1993 were marginal. Whether there were profits or losses, the fact remained that after the termination, the plaintiffs had no new business but they had already incurred expenses in keeping stocks as well as overhead charges.

[50] PW5 on the other hand testified that as at 31 January 1995, the 2nd plaintiff has lost a sum of RM9,532,662 being its actual amount invested in the PABX venture and a further sum of RM3,350,829 being the value of the stock in hand which the defendants refused to repurchase after the termination. PW5 is not

able to produce evidence to show that an offer was made by the plaintiffs to sell the stock to the defendants and the same was rejected by the defendants.

[51] To counter the accuracy of the audited accounts, the defendants, through their solicitors, approached Messrs BDO Binder to review the audited accounts of the plaintiff for the financial years ended 31 December 1979 to 31 January 1995. The instruction was given to BDO Binder *vide* a letter dated 18 April 2005. This task was carried out by DW1, a qualified accountant. DW1 has prepared a report dated 15 July 2005, marked WSDW1. What is important to note is this report was never produced and shown to PW4 and PW5 during the plaintiffs' case. This report was only introduced during the defendants' case. It therefore deprived the plaintiffs' chances to question the accuracy of the content of the report. Obviously the report prepared by DW1 is negative in every aspect of the plaintiffs' claim. Commenting on the amount claimed by the plaintiffs' under para. 13 of the statement of claim, DW1 kept on repeating that they are unable to verify the amount claimed from the audited account.

[52] Having perused exh. WSDW1 and compared it with the audited account submitted by the plaintiffs, I have no hesitation to say that the audited account by Arthur Andersen is more reliable and accurate for the following reasons:

1. Arthur Andersen is an established and reputable public accountant.

2. Their examination was made in accordance with approved auditing standards.

3. It is the opinion of the public accountants that:

   (i) The accounts are properly drawn up in accordance with the provisions of the Companies Act 1965 and give a true and fair view of the state of affairs of the company as at 31 January 1995; and

   (ii) The accounting and other records and the registers required by the Act to be kept by the company have been properly kept in accordance with the provision of the Act.

[53] Based on the reasons above, I therefore reject DW1's evidence and the report prepared by him. With the rejection, this court is left with no option but to accept the evidence adduced by PW4 and PW5. Their evidence has proved that the plaintiffs did suffer losses in terms of the amount invested in the venture, the stock in hand and the various expenses incurred to keep the venture going but with no new businesses. As for the quantum of losses suffered, I accept their evidence based on the audited account. The figures in the audited account reflect the true state of affairs in the plaintiffs' company.

[54] To conclude, on the balance of probability, I found that the plaintiffs have succeeded in proving their claim. I, therefore, allowed the plaintiffs claim as prayed for in prayer 13.2(a), (d) and (e) of the statement of claim. Interest at the rate of 8% per annum from the date of filing of the writ till satisfaction and costs of this action.